EDDY SALIM & ORS v. ISKANDAR REGIONAL DEVELOPMENT AUTHORITY & ORS

HIGH COURT MALAYA, JOHOR BAHRU
TEO SAY ENG JC
[CIVIL SUIT NO: 22NCVC-158-06-2013]
16 FEBRUARY 2014

CIVIL PROCEDURE: *Injunction – Interlocutory injunction – Injunction to restrain from dealing with customary land – Destruction of subject matter of suit prior to resolution of issues at trial – Balance of convenience – Whether far greater hardship and harm would result if injunction refused – Whether balance of convenience tilted in favour of maintaining status quo*

CIVIL PROCEDURE: *Injunction – Damages – Undertaking as to damages – Waiver – Rights of aboriginal peoples over customary territory – Matters of public interest – Justice of case versus financial ability – Complete and irreversible loss of customary territory in its natural state – Whether requirement for an undertaking as to damages should be waived – Whether damages an adequate remedy – Whether consideration of public interest a relevant factor in granting an interlocutory injunction*

EVIDENCE: *Admissions – Absence of contraction of fact – Failure to contest issue of serious questions to be tried in injunction application – Whether deemed to have conceded existence of serious issues to be tried*

NATIVE LAW AND CUSTOM: *Land dispute – Customary rights over land – Reclamation works taking place in customary territory – Application for injunctive relief to restrain defendants carrying out works within customary territory pending disposal of plaintiffs' action – Balance of convenience – Whether far greater hardship and harm would result if injunction refused – Rights of aboriginal peoples over customary territory – Matters of public interest – Complete and irreversible loss of customary territory in its natural state – Whether requirement for an undertaking as to damages should be waived – Whether damages adequate remedy*

The plaintiffs, as aboriginal peoples (Orang Asli), had commenced an action against the defendants seeking various declarations for the restoration of their customary lands and/or water ('customary territory') to them in its original state. After filing of the writ against the defendants, it came to the plaintiffs' knowledge that significant reclamation and/or earth works had continued to take place in their customary territory, which was the subject matter of the dispute. Therefore, the plaintiffs filed an application for injunctive relief to restrain the seventh and ninth defendants from carrying out and from commencing any type of works within the said customary territory pending disposal of the plaintiffs' action against the defendants. The plaintiffs claimed that the seventh and ninth defendants had acted in a manner that was

detrimental to the subject matter of the plaintiffs' claim and therefore the injunctive relief prayed for were necessary to preserve the subject matter of the plaintiffs' claim pending trial.

Held (allowing plaintiffs' application for injunction with costs in the cause):

(1) The plaintiffs had identified the entire area of the lands which they claimed to be their customary territory which covered Kampung Sungai Temon and Kampung Bakar Batu *vide* a google map. As to whether the plaintiffs could prove their claim based on the map and/or any other evidence was a matter for the trial court to decide. (paras 12 & 13)

(2) By not contesting the issue of serious questions to be tried, the defendants were deemed to have conceded that there were serious issues to be tried. Furthermore, the seventh and ninth defendants had admitted through their witness *vide* an affidavit affirmed by one Lim Soo San that there were a number of issues that require a trial. Thus, the plaintiffs had disclosed some *bona fide* serious issues to be tried. (para 20)

(3) The plaintiffs had convinced the court that damages was not an adequate remedy if the court should eventually decide the case in their favour. It was beyond the jurisdiction of this court to interfere with the reclamation works based solely on the illegality factor. However, the court could grant an injunction if the alleged reclamation works carried out by the defendant would destroy the subject matter of the plaintiffs' claim pending trial. (para 34)(para 42)

(4) To maintain the *status quo* as claimed by the defendants did not solve the problem as there was a great likelihood that the subject matter of the claim would have been destroyed by the time the suit was resolved by the court. The more pertinent issue was not whether to maintain the *status quo* as claimed by the defendants but this court should restrain the defendants from carrying out further activities which would further destroy the subject matter of the claim so as to preserve the plaintiffs' customary territory in its original state as far as it could. (para 42)

(5) Undertaking as to damages should be waived in this case for the reason that the plaintiffs were the Orang Asli, the first peoples of Malaysia with very limited means and a requirement that they give an undertaking as to damages was tantamount to shutting them out of the court. A consideration of public interest is a relevant factor in granting an interlocutory injunction. The court should have been more concerned with the essential justice of a case, rather than the plaintiffs' ability. However, the unique position of the plaintiffs as the aboriginal peoples had outweighed the plaintiffs' financial ability which warranted the court to dispense with the usual undertaking as to damages. (para 42)

Case(s) referred to:

Allen v. Jambo Holdings Ltd [1980] 1 WLR 1252; [1980] 2 All ER 502 ***(refd)***

Alor Janggus Soon Seng Trading Sdn Bhd & 6 Ors v. Sey Hoe Sdn Bhd & 2 Ors [1995] 1 CLJ 461 SC ***(refd)***

American Cyanamid Co v. Ethicon [1975] AC 396 ***(refd)***

Cheng Hang Guan & Ors v. Perumahan Farlim (PG) Sdn Bhd & Ors [1988] 2 CLJ 35; [1988] 1 CLJ (Rep) 435 HC ***(refd)***

Fawziah Holdings Sdn Bhd v. Metramac Corporation Sdn Bhd And Another Appeal [2006] 1 CLJ 996 CA ***(refd)***

Garden Cottage Foods Ltd v. Milk Marketing Board [1983] 2 All ER 770; [1984] AC 130 ***(refd)***

Government of Malaysia v. Lim Kit Siang & Another Case [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63 SC ***(refd)***

Harrow London Borough Council v. Johnstone [1997] 1 WLR 459 ***(refd)***

Jasa Keramat Sdn Bhd v. Monatech (M) Sdn Bhd [2001] 4 CLJ 549 CA ***(refd)***

Keet Gerald Francis Noel John v. Mohd Noor & Ors [1995] 1 CLJ 293 CA ***(refd)***

Larut Consolidated Bhd & Anor v. Khoo Ee Bee & Ors [1997] 5 CLJ 307 HC ***(refd)***

Lim Khoo Eong v. Trustee of Leong San Tong Khoo Kongsi (Penang) Registered & 2 Ors [1986] 1 LNS 5 HC ***(refd)***

Lim Kit Siang v. United Engineers (M) Bhd & Ors [1987] 2 CLJ 347; [1987] CLJ (Rep) 722 HC ***(refd)***

Maurice Bujang v. Peter Nansian Ngusie [2007] 8 CLJ 431 HC ***(refd)***

Pathma Naganather & Anor v. Nivedita Naganather (No 1) [2003] 8 CLJ 457 HC ***(refd)***

Tenaga Nasional Bhd v. Dolomite Industrial Park Sdn Bhd [2000] 1 CLJ 695 CA ***(refd)***

Verschures Creameries, Ltd v. Hull and Netherlands Steamship Co Ltd [1921] 2 KB 608 ***(refd)***

Yukilon Manufacturing Sdn Bhd & Anor v. Dato' Wong Gek Meng & Ors (No 4) [1998] 4 CLJ (Supp) 319 HC ***(refd)***

Legislation referred to:

Environmental Quality Act 1974, ss. 4(aa), 34A(2)

For the plaintiff - Aaron Mathews (Yogeswaran Subramaniam & K Mohan with him); M/s K Mohan & Co

For the 7th & 9th defendants - Alvin Julian (Sahada Salihin with him); M/s Shearn Delamore & Co

Reported by Thirunavakarasu Vijayan

JUDGMENT

Teo Say Eng JC:

[1] This is an *inter partes* hearing of an application by the plaintiff against the seventh and the ninth defendants for *inter alia*, the following injunctory orders:

(a) An order that the seventh and/or the ninth defendants by themselves and/or their servants, agents, nominees howsoever be restrained from continuing to carry out any type of works (including but not limited to construction and/or land reclamation works) within the area claimed by

A the plaintiffs in the instant action marked as exh. "KOAS2" and "KOAS3" in the statement of claim filed in the suit herein and attached hereto as Appendix 1 and particularly the areas marked as A, B and C in Appendix 2 hereto, pending the final determination of the suit filed herein;

B (b) An order that the seventh and/or the ninth defendants by themselves and/or their servants, agents, nominees howsoever be restrained from commencing any type of works (including but not limited to construction and/or land reclamation works) within the area claimed by the plaintiffs in the instant action marked as exhs. "KOAS2" and C "KOAS3" in the statement of claim filed in the suit herein and attached hereto as Appendix 1 and particularly the areas marked as A, B and C in Appendix 2 hereto, pending the final determination of the suit filed herein.

D **[2]** In a nutshell, the first prayer is to restrain the seventh defendant and the ninth defendant from continuing to carry out any type of works within the areas claimed by the plaintiff and the second prayer is to restrain the seventh and ninth defendants from commencing any types of works within the areas claimed by the plaintiffs.

E **The Background Facts**

[3] The plaintiffs filed an action against the defendants seeking declaration that (among others) the plaintiffs have customary rights over the lands at Kampung Temon and Kampung Bakar Batu (hereinafter referred to as "the said lands") and specifically in respect of the seventh to the tenth defendants F a declaration that alienations of the said lands to the seventh to the tenth defendants are null and void. The plaintiffs also seek a declaration that the acts of the seventh to the tenth defendant amount to trespass and pray for an order for damages.

G **[4]** After the filing of the writ, it came to the plaintiffs' notice that (among others) significant reclamation works have continued to take place in their customary lands and customary waters (collectively referred to as customary territory) which is the subject matter of the dispute. The plaintiffs then filed this application in encl. 63 for injunctive relief. The plaintiffs alleged that the seventh and the ninth defendants had acted in a manner that is detrimental H to the subject matter of the plaintiffs' claim. The plaintiffs had identified the disputed areas and alleged that the seventh and the ninth defendants acted in destructions of the plaintiffs' customary territory.

[5] The defence put forward by the seventh and the ninth defendants is I that they are the registered owners of the disputed areas and any reclamation and/or earth works at the disputed areas are done in compliance with regulations of the relevant authorities.

Note: The background facts culminating to the present application can be found at paras. 5 to 12 of the plaintiffs' first affidavit.

The General Principles

[6] It is trite law that a judge hearing an application for an interlocutory injunction must consider the following matters:

(a) The plaintiffs' claim against the defendant must disclose a *bona fide* serious issue to be tried. At this interlocutory stage, the court is not required to make a final determination on the merits of the claim or the rights of the parties;

(b) The court must then consider where the justice of the case lies. In determining where the justice of the case lies, the court must consider (1) the harm that the injunction would produce by its grant; and (2) the harm that would result from its refusal, and come to a conclusion as to which party would suffer greater injustice. In determining this, the court must consider whether damages would constitute an adequate remedy in respect of the plaintiffs' claim. If damages are adequate, the court should not grant an injunction order.

(c) If the relevant factors are evenly balanced, the court should maintain the *status quo*.

(*American Cyanamid Co v. Ethicon* [1975] AC 396; *Keet Gerald Francis Noel John v. Mohd Noor @ Harun Bin Abdullah & 2 Ors* [1995] 1 CLJ 293; [1995] 1 MLJ 193; *Alor Janggus Soon Seng Trading Sdn Bhd & 6 Ors v. Sey Hoe Sdn Bhd & 2 Ors* [1995] 1 CLJ 461; [1995] 1 MLJ 241; *Garden Cottage Foods Ltd v. Milk Marketing Board* [1984] AC 130).

Public interest is also a relevant consideration to be considered in granting an interlocutory injunction. (*Tenaga Nasional Bhd v. Dolomite Industrial Park Sdn Bhd* [2000] 1 CLJ 695).

Issues For Determination

Whether The Disputed Areas Have Been Identified

[7] The defendants alleged that the lots which the plaintiffs complained that reclamation and/or earthworks that had taken place in the entire area of the land claimed by them as their customary land had not been properly identified.

[8] First, the map which the plaintiffs used is a google map and not a proper survey map. Secondly, the entire area of the land was owned by various departments and the seventh and the ninth defendants only own part of it. If an injunction was to be granted against the seventh and the ninth

defendants, their involvement in which parts of the entire land must first be identified. So there is a crisis of identity of what exactly a subject matter of this injunction is.

[9] The defendants submit that if an injunction was to restrain any types of works to be carried out in the entire land the defendants should not be confined to the seventh and the ninth defendants and should include every owner of the entire land. In the circumstances, the defendants submit that the prayer for injunction is not sufficiently precise.

[10] The plaintiffs in reply submit that they have identified the areas upon which the plaintiffs are claiming based on a map attached to the Appendix 1 in encl. 63. Whether or not the map is accurate is subject to proof at the trial. The whole areas claimed cover Kampung Sungai Temon and Kampung Bakar Batu. They have highlighted the areas where the alleged oil spill and the reclamation works were taking place at areas marked A, B and C in Appendix 1.

[11] The injunction as pleaded is to bind the whole area of the land claimed by the plaintiff that is to restrain any types of works that would destroy the subject matter of the claim. The plaintiff explained that the reason that this application was brought against the seventh and the ninth defendants was because the others are not doing any reclamation work.

Ruling Of The Court

[12] First and foremost, I agree with the learned counsel for the plaintiffs that the plaintiffs have identified the entire area of the lands claimed to be their customary territory which covers Kampung Sungai Temon and Kampung Bakar Batu *vide* a google map.

[13] As to whether the plaintiffs could prove their claim based on the map and/or any other evidence is a matter for the trial court to decide. Since the plaintiffs alleged that some reclamation works by the seventh and the ninth defendants had taken place in areas marked A, B and C in Appendix 1 which have and would further destroy the subject matter of the claim, they are making this application to restrain the said defendants from continuing to carry out such works and from commencing any types of works which will destroy the subject matter of the claim.

[14] The plaintiffs did not bring in the other defendants because they have denied being involved in the said reclamation work. I therefore find that the contention by the seventh and the ninth defendants that the plaintiffs have to identify exactly the areas in which the seventh and the ninth defendants had carried out the reclamation work is without merit.

Whether There Are Serious Questions/Issues To Be Tried

Plaintiffs' Submission

[15] On the material submitted before this honourable court the plaintiffs submit that it is axiomatic that there exists serious questions to be tried, namely:

(i) Whether the areas marked in exhs. "KOAS2" and "KOAS3" in the statement of claim are in fact the plaintiffs' customary lands and/or waters?

(ii) Whether the alienation of the plaintiffs' customary territory by the second defendant to, amongst others, the seventh and the ninth defendants is in consequence unlawful?

(iii) Whether the works being carried out on the plaintiffs' customary territory by, amongst others, the seventh and the ninth defendants is in consequence, unlawful?

(iv) Whether the defendants, specifically the seventh to the thirteenth defendants, have committed acts of trespass by unlawfully entering into the plaintiffs' customary territory?

(v) Whether the plaintiffs are entitled to permanent injunction to prevent the defendants from further encroaching and/or destroying their customary territory?

[16] At the heart of the matter, the plaintiffs submit that the issue essentially is whether or not the alienation of the plaintiffs' land to the various defendants is void due to the fact that these lands are customary lands belonging to the plaintiffs.

[17] Moreover, the plaintiffs have pointed out that the seventh and the ninth defendants have themselves stated that there are a number of issues that require a trial. This can be found in an affidavit affirmed by Lim Soo San on 20 March 2013 on behalf of, amongst others, the seventh and the ninth defendants (see exh. EBS9). On this ground alone, it is clear that there exists serious issues to be tried.

[18] The plaintiffs further submit that in light of the above it is clear that the issues as highlighted above are serious issues that must be tried and disposed off *viva voce*. Accordingly, the plaintiffs submit that they have satisfied the first limb of the *Keet Gerald* test.

Seventh And Ninth Defendants' Submission And Ruling Of The Court

[19] I notice that the defendants have failed to touch on this issue in their submission, oral or written, before this court.

[20] By not contesting the said issue of serious questions to be tried, the defendants are deemed to have conceded that there are serious issues to be tried. Furthermore the seventh defendant and the ninth defendant have admitted through their witness *vide* an affidavit affirmed by one Lim Soo San that there were a number of issues that require a trial (see exh. EBS9).

[21] Having perused the plaintiffs' statement of claim and the issues as highlighted by the plaintiffs in their submission I find that the plaintiffs have satisfied the first limb of *Keet Gerald* test that is, the plaintiffs' claim against the defendants have disclosed some *bona fide* serious issues to be tried.

Balance Of Convenience

[22] The plaintiffs submit that having satisfied that there are serious issues to be tried, the next question to be answered is whether the balance of convenience favours the grant of the injunction sought in this case.

[23] The plaintiffs submit that the answer is in the affirmative for the following reasons:

(i) The continued destruction of the plaintiffs' customary territory by the defendants' activities amounts to an attempt to destroy the subject matter of the suit prior to the resolution of the issues raised herein and is therefore calculated to unfairly and gravely prejudice their rights in their customary territory and the remedies prayed for therein. This Honourable Court must not condone the destruction of the subject matter pending the determination of the plaintiffs' suit as the actions of the seventh and the ninth defendants in permitting such activities to continue on the plaintiffs' customary territory, whether by themselves, their servants and/or agents, are tantamount to contempt. The plaintiffs refer this honourable court to the Court of Appeal case of *Jasa Keramat Sdn Bhd v. Monatech (M) Sdn Bhd* [2001] 4 CLJ 549; [2001] 4 MLJ 577 which referred to the English case of *Harrow London Borough Council v. Johnstone* [1997] 1 WLR 459 wherein it was stated:

> It is true that Courts should be slow to punish a person for contempt. But that does not mean that the Courts should sit with folded arms, engrossed with legal theories whilst parties in the proceedings are removing the subject matter of the claim to defeat the making of the order that the Court would and might make, and to reduce the order, if and when made, to no more than a paper judgment, as had happened in this case. Interest of individuals to be respected, yes, but not that of dishonest individuals. And, when the interest of justice and of the public come face to face with the interest of individuals, the former must prevail. Otherwise, the public will lose confidence in the Courts. If the Courts and the administration of justice are to be respected, the Courts must ensure that their judgments are effective.

> Judgments are not mere literary works. No matter how learned they are and how well they are written, if they cannot deliver the goods, they are of no use.

(ii) Further, the plaintiffs submit that the activities of the seventh and the ninth defendants (whether by themselves and/or their servants and/or agents) on the said land are being carried out illegally due to the fact that the Environmental Impact Assessment ('EIA') for the mixed development project proposed to be carried out on the said lands has been rejected by the Department of Environment ('DOE'). In this respect, the plaintiffs submit that the Environmental Quality Act 1974 ("the EQ Act") makes it unlawful for anyone to carry out an activity, for which an EIA is required, without the prior submission and approval of the EIA (which approval the defendants did not have).

The defendant' actions fall within the "prescribed activities" under s. 34A(2) of the EQ Act for the simple reason that the defendants had made an EIA submission. Therefore, the plaintiffs would further submit that since the EIA had been rejected by the DOE, the seventh and the ninth defendants' development works on the customary lands is illegal and this Honourable Court must not condone such activities.

The plaintiffs submit that the defendants should be restrained from carrying out their illegal activities (which in any event are causing destruction to the subject matter of the plaintiffs' suit) pending the determination of the plaintiffs' suit. Accordingly, the plaintiffs submit that the balance of justice unequivocally tilts in the plaintiffs' favour.

(iii) Damages An Adequate Remedy?

In respect of this third and final limb, the plaintiffs submit that damages will not be an adequate remedy to the plaintiffs should the court refuse the relief sought under the application herein.

The plaintiffs submit that unless restrained by this Honourable Court, the defendants will continue to carry out their destructive actions which will result in the total and unequivocal destruction of the subject matter of the plaintiffs' suit. In this regard, if this comes to pass, it will mean the complete and irreversible loss to the plaintiffs of their customary territory which, as has been pleaded in the statement of claim, constitute the life support system of the plaintiffs, and which the plaintiffs depend on for their shelter, livelihood, food, medicines and spiritual and cultural nourishments.

The plaintiffs submit that the plaintiffs' primary claim is and has always been for the return of their customary lands and/or waters. The damages claimed are only in respect of the trespass perpetuated by the defendants on the lands and in the alternative for the acquisition of the plaintiffs' lands.

(iv) The undertaking as to damages

The plaintiffs submit that as stated in the plaintiffs' first affidavit, the requirement for an undertaking as to damages should be waived in the instant case.

In this respect, the plaintiffs would at the outset submit that it is an accepted position in law that this Honourable Court has the discretion to waive an undertaking as to damages (see *Allen v. Jambo* [1980] 2 All ER 502 and *Lim Khoo Eong v. Trustee of Leong San Tong Khoo Kongsi (Penang) Registered & 2 Ors* [1986] 1 LNS 5; [1987] 2 MLJ 621).

In the instant case, the plaintiffs submit that the undertaking as to damages should be waived due to the fact that:

(a) The plaintiffs are the first peoples of Malaysia and it cannot be disputed that they are individuals with limited means. Therefore a requirement that they give an undertaking as to damages would be too onerous to bear and would be tantamount to shutting them out of court. In this respect, the plaintiffs submit that this Honourable Court should only be concerned with the justice of the case and not the financial ability of the plaintiffs. The plaintiffs then refers this Honourable Court to the salutary words of Clement Skinner J (as he then was) in the case of *Maurice Bujang v. Peter Nansian Ngusie* [2007] 8 CLJ 431 (*supra*) wherein he stated:

> By insisting that the Plaintiff be denied an injunction he sought unless he could show that he was able to fulfil his undertaking in damages, the Defendant was effectively asking the Court to shut its doors to the Plaintiff for what he was that is, a poor litigant. In such situations, this Court was more concerned with the essential justice of a case than questions of financial ability of the party.

(b) Notwithstanding the above, it cannot be disputed that the plaintiffs' suit is one of public interest as it deals with the rights of the Orang Asli. In this regard the plaintiffs would refer this Honourable Court to the case of *Lim Kit Siang v. United Engineers (M) Bhd & Ors* [1987] 2 CLJ 347; [1987] CLJ (Rep) 722; [1988] 1 MLJ 51 (see Tab 11 FBA). In this case, His Lordship VC George J (as he then was) stated:

> ... in this kind of public interest litigation, to insist on imposing an undertaking as to damages is to thwart "the public-spirit citizen from bringing the matter to the attention of the Court to vindicate the rule of law and get the unlawful conduct stopped".

In view of all the above, the plaintiffs submit that the requirement for an undertaking as to damages should be waived in the instant case.

(v) On the issue of delay

The plaintiffs submit that there has been no delay in filing this application for injunction. The plaintiffs have shown that the destructive works of the defendants began at the early part of the year (2013). Even if there was a delay, the defendants had not been prejudiced by the same. Indeed the defendants were not disadvantaged by the alleged delay. In fact the defendants had benefited from the alleged delay due to the fact that they had been able to carry out their reclamation works with impunity: See *Larut Consolidated Bhd & Anor v. Khoo Ee Bee & Ors* [1997] 5 CLJ 307; [1997] 5 MLJ 77.

(vi) On the issue of *status quo*

The plaintiffs submit that just because the defendants were carrying on its reclamation works prior to the filing of the instant suit and or the application does not mean that the defendants were entitled to continue to destroy the subject matter of the claim.

The plaintiffs further submit that even if they were not aware that the defendants had got the approvals to do the reclamation works and that was the *status quo* that they were doing the works prior to the filing of the suit, such reclamation which will destroy the matter of the claim work must stop once the suit is filed.

Conclusion

In the final analysis, the plaintiffs submit that there exist real live issues that require determination by this Honourable Court. It is further submitted that the balance of justice lies with the plaintiff and damages would not be an adequate remedy. Accordingly, the injunctive reliefs prayed are necessary and must be granted in order to preserve the subject matter of the plaintiffs claim.

The plaintiffs submit that in the instant case, the undertaking as to damages should be waived by this Honourable Court for the reasons outlined above.

Accordingly, the plaintiffs pray for order in terms of the instant application.

Defendants' Reply

On The Issue Of Illegality

[24] The defendant submit that they had obtained approval from the Department of Environment based on the EIA that they had submitted on 15 August 2003 and 27 December 2002.

[25] The defendants also submit that the issue of illegality is beyond the scope of this honourable court. The defendants is relying on a Supreme Court decision in *Government of Malaysia v. Lim Kit Siang & Another Case* [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63; [1988] 2 MLJ 12 where the Lord President Salleh Abas cited the case of *Gouriet* in his main judgment as follows:

> In *Gouriet*'s case, the House of Lords was confronted with a similar question. The House refused to allow the enforcement of criminal law by a civil Court. Lord Diplock reminded the House of the importance of keeping a difference between private law and public law meaning, in the context of that case, civil law and criminal law. In the words of Lord Diplock it is the failure to recognize this distinction that has led to some confusion and an unaccustomed degree of rhetoric in this case. I accept this approach in view of the separation of the system of criminal justice from that of the civil justice system. It is unacceptable that criminal law should be enforced by means of civil proceedings for a declaration when the Court's power to grant that remedy is only at the discretion of the Court. Jurisdiction of a criminal Court is fixed and certain. The standard of proof in a criminal case is different from that required in a civil case and moreover the Attorney-General is the guardian of public interest and as the Public Prosecutor, he, not the Court, is in control of all prosecutions. How can a prosecution of this nature be serious objections to the exercise by the Civil Court of its discretionary power relating to declaratory and injunctive remedies.

[26] The defendants further cited the second majority judgment of Tun Hamid Omar where His Lordship said:

> With all due respect to the learned judge, my view is clear in that fundamentally where a statute creates a criminal offence by prescribing a penalty for the breach of it but not providing a civil remedy - the general rule is that no private individual can bring an action to enforce the criminal law, either by way of an injunction or by a declaration or by damages. I am inclined to the view that it should be left to the Attorney-General to bring an action, either of his own motion or at the instance of a member of the public who relates the facts to him: See *Gouriet*'s case.

[27] Applying the principles to our case, the defendants submit that the Environmental Quality Act creates a criminal offence *vide* s. 34 by prescribing a penalty for the breach but does not provide a civil remedy. Furthermore a new section that is s. 4(aa) has been added to the Act to give power to the Director General to issue prohibiting orders to stop any alleged illegal works.

[28] The defendants submit that in the sum total of the legislative frame work cited and the Supreme Court decision referred to, the issue of non compliance with the EQA is beyond the jurisdiction of this honourable court. The plaintiffs are asking the civil court to enforce a criminal sanction by granting injunctive relief. The defendants submit that such powers are in fact vested with the Director General of the Environmental Department.

[29] On the issue of *status quo*, the defendants submit that:

(i) The plaintiff states in their supporting affidavit before this Honourable Court that the plaintiffs' application for an interlocutory injunction is essential to preserve the *status quo* pending the determination of the main suit of this action. The defendants submit that the plaintiffs had failed to appreciate the definition of *status quo*.

(ii) In *Garden Cottage Foods Ltd v. Milk Marketing Board* [1983] 2 All ER 770 at page 771 (Tab 9, DBOD) it was held that:

> For the purpose of deciding whether an interlocutory injunction should be granted to preserve *status quo*, the *status quo* is the state of affairs existing during the period immediately preceding the issue of the writ seeking the permanent injunction or, if there is unreasonable delay between the issue of the writ and the motion for an interlocutory injunction, the period immediately preceding the motion.

(iii) The definition of *status quo* by Lord Diplock in *Garden Cottage Foods* is applied in the following local decisions:

See *Cheng Hang Guan & Ors v. Perumahan Farlim (PG) Sdn Bhd & Ors* [1988] 2 CLJ 35; [1988] 1 CLJ (Rep) 435 at p. 451 (Tab 2, DBOD)

> ...the *status quo* means the position prevailing immediately, before the making of the Plaintiffs' application for *ex parte* interim reliefs when the Third and Fourth Defendants embarked upon the activities sought to be restrained.

(See *Keat Gerald Francis* at p. 2070).

(iv) Reclamation and/or earthworks at D4 had started as early as 24 July 2012. Whereas, the reclamation and/or earthworks at C3 had started on/or about 21 August 2012. The ninth defendant had only commenced clearing works on C4 and this was stopped in 2011. The duration of the continuation of these works is more than minimal and would now constitute the *status quo*.

(v) At this juncture, the seventh and the ninth defendants wish to submit that any reclamation and/or earthworks at the disputed areas are done in compliance with regulatory requirements and with the approval of the relevant authorities.

(vi) In contradiction to the plaintiffs' allegation, Environmental Impact Assessment Reports by the Department of Environment, Johor were approved for D4 on 15 August 2003, C3 on 27 December 2002 and C4 on 27 December 2002.

(vii) Based on the preceding timeline, it is apparent that development works were approved and had commenced at the disputed areas well before the filing of the plaintiffs' application and even before the filing of the plaintiff's main suit against the defendants.

(viii) It is humbly submitted that the plaintiffs have failed to take timely steps to object to or attempt to obtain preventive orders regarding the reclamation and/or earthworks at the time of the commencement of the works or soon thereafter. If indeed the plaintiffs are continuously occupying the lands and rely on the lands to sustain their livelihood, they would have sufficient knowledge of the works done around the disputed areas.

(ix) *Status quo* as defined in *Garden Cottage Foods* intends for the continuation of works by the seventh and the ninth defendants as that was the state of affairs existing during the period immediately preceding the issue of the writ seeking the permanent injunction and the period immediately preceding the motion.

Is Damages An Adequate Remedy?

[30] The seventh and the ninth defendants submit that the plaintiffs' claim can be adequately compensated by damages should the plaintiffs in the unlikely event succeed at trial.

[31] The plaintiffs pray for the grant of an interlocutory injunction on the basis (among others) that damages will not be an adequate remedy. In contradiction to the plaintiffs' current position, they had repeatedly pleaded for an order of damages against the defendants in their statement of claim, in particular the reliefs sought under paras. 89(9), 89(13) and 89(22) of the statement of claim.

[32] The plaintiffs are barred in law to approbate and reprobate in their stand by now claiming that damages will not be an adequate remedy in the plaintiffs' application.

[33] Scrutton LJ in *Verschures Creameries, Ltd v. Hull and Netherlands Steamship Co Ltd* [1921] 2 KB 608 at p. 611 explained:

> A Plaintiff is not permitted to 'approbate and reprobate'. The phrase is apparently borrowed from the Scotch law, where it is used to express the principle embodied in our doctrine of election – namely, that no party can accept and reject the same instrument.

[34] In *Fawziah Holdings Sdn Bhd v. Metramac Corporation Sdn Bhd And Another Appeal* [2006] 1 CLJ 996 at p. 1012; [2006] 1 MLJ 505 at p. 515, Gopal Sri Ram JCA (as he then was) elucidated the doctrine succinctly as follows:

> In the second place, the right to avoid a transaction carries with it some limitations. You cannot affirm so much of a transaction as benefits you and seek to avoid that part of it that imposes a burden. You cannot pick and choose. You must either affirm the whole transaction or avoid the whole of it. There is no half-way house. Take the present instance. There

> are many clauses in the sale and purchase agreement. Some confer benefits on the Defendant. Others may appear burdensome. Also there are several interlocking agreements entered into between the parties. Again, some may be beneficial and other burdensome. What the Defendant is seeking to do here is to avoid selected parts of the transaction. It is seeking to approbate and reprobate. It cannot do that.

[35] Some of the plaintiffs had also brought similar claim for damages due to the alleged loss of livelihood to the attention of the seventh to the tenth defendants. In that particular claim, allegations were made that developments works by the seventh to the tenth defendants had reduced their income as fishermen. Damages were assessed and subsequently awarded. The plaintiffs have failed to make a full and frank disclosure on these material facts in this present application.

Undertaking As To Damages

[36] The seventh and the ninth defendants submit that an undertaking as to damages is a necessary requirement before a court can grant interlocutory injunction. Without such an undertaking, the defendants will not have any available recourse in the event that the injunction was wrongfully granted.

[37] To further amplify this point, the seventh and the ninth defendants cited the decision of His Lordship Malik Ishak J's (as His Lordship then was) in *Yukilon Manufacturing Sdn Bhd & Anor v. Dato' Wong Gek Meng & Ors (No 4)* [1998] 4 CLJ (Supp) 319 at p. 377; [1998] 7 MLJ 551 at p. 601:

> An undertaking as to damages is always required before the Court grants an interlocutory injunction ...
>
> In the event there may be difficulty in enforcing the Plaintiff's undertaking, either because the Plaintiff may not be worth 'power and shot' then the Plaintiff is obliged to fulfil his undertaking. And if the Plaintiff is outside the jurisdiction the Court may require him to give an undertaking by way of a security.
>
> In practice, the Court will not embark on an elaborate investigation as to the financial means of a particular Plaintiff. A bare undertaking, like the present case, is sufficient.

(See *Pathma Naganather & Anor v. Nivedita Naganather (No 1)* [2003] 8 CLJ 457; [2002] 6 MLJ 361 at pp. 361 & 362).

[38] It is humbly submitted that the plaintiffs have abandoned their customary way of lives and are no longer fully dependent on it as a source of livelihood. The requirement for an undertaking as to damages must not be disposed on the premise that the plaintiffs are people of limited means.

[39] The ability of the applicant to honour his undertaking is a material factor for the court in determining the balance of convenience in granting an interlocutory injunction. Issue on the value of an undertaking is of a separate consideration. Such was the position echoed in the following cases, in which undertaking as to damages was required before the court grants an interlocutory injunction:

Allen v. Jambo Holdings Ltd [1980] 1 WLR 1252 at pp. 1256 & 1257 (Tab 6, DBOD):

> There is another point that I must mention. It is said whenever a *Mareva* injunction is granted; the Plaintiff has to give the cross-undertaking in damages. Suppose the widow should lose this case altogether. She is legally aided. Her undertaking is worth nothing. I would not assent to that argument. As Shaw LJ said in the course of the argument, a legally aided Plaintiff is by our statutes not to be in any worse position by reason of being legally aided than any other Plaintiff would be. I do not see why a poor Plaintiff should be denied a *Mareva* Injunction just because he is poor, whereas a rich Plaintiff would get it. One has to look at these matters broadly.

Cheng Hang Guan & Ors v. Perumahan Farlim (PG) Sdn Bhd & Ors [1988] 2 CLJ 35; [1988] 1 CLJ (Rep) 435 at p. 451:

> In any event, the Court will not generally deny a Plaintiff an interlocutory injunction to which he would otherwise be entitled simply on the ground that his cross-undertakings in damages would be of limited or of no value. So, for example, in *Allen v. Jambo Holdings Ltd* the Court of Appeal held, when granting a *Mareva* injunction, a cross-undertaking was acceptable from the Plaintiff although he was legally aided. The rationale behind this was that questions of financial ability ought not to affect the position in regards to what is the essential justice of the case.

[40] The seventh and the ninth defendants submit that this is not a case that merits a dispensation of an undertaking as to damages. The magnitude of development on the seventh and the ninth defendants lands transcend beyond corporate profit as the same involves the nation's interest.

Ruling Of The Court On Balance Of Convenience

[41] In considering where the balance of justice lies, I have taken into account the harm the injunction would produce by its grant and the harm that would result from its refusal.

[42] Having weighed all the factors raised in the respective submissions by the parties concerned, I have come to the following findings:

(i) Whether damages is an adequate remedy?

The plaintiffs' main ground for this application is that they wanted their land to be restored to them in its original state which constitute the life support system which the plaintiffs depend on for their shelter, livelihood, food, medicines, spiritual and cultural nourishments. Their main concern is that if the defendants were to carry on with their reclamation works and this would destroy the subject matter of the suit prior to the resolution of the issues raised in this suit. It would mean the complete and irreversible loss to the plaintiffs of their customary territory in its natural state and damages is not an adequate remedy.

I fully agree with the plaintiffs as far as this issue is concerned. I am therefore satisfied that the plaintiffs have convinced the court that damages is not an adequate remedy if the court should eventually decide the case in their favour.

On the submission by the defendants that the plaintiffs had also repeatedly pleaded for an order of damages against the defendants in their statement of claim and should be barred in law to approbate and reprobate in their stand by now claiming that damages will not be an adequate remedy: *Verschures Creamerier Ltd v. Hull and Netherlands Steamship Co Ltd* [1921] 2 KB 608 at p. 611, I agree with the submission by the plaintiffs that they do not approbate and reprobate as their primary claim is for the return of their customary territory and the claims for damages are in respect of the trespass perpetuated by the defendants on their lands and in the alternative for the acquisition of their land.

(ii) On the issue of illegality of the defendants' activities

I find that the evidence adduced *vide* affidavits before the court is not sufficient for me to decide whether such reclamation works were carried out in contravention of the Environmental Quality Act. This may only be properly resolved at the trial by calling witnesses from the Department of Environment ('DOE').

Even if there was sufficient evidence that the defendants had carried out reclamation works without the approval of the DOE, I agree with the learned counsel for the defendants that the court cannot impose criminal sanction by granting an injunction to restrain the defendants from carrying out the said reclamation works.

I am therefore of the view that it is beyond the jurisdiction of this court to interfere with the reclamation works based solely on the illegality factor.

However, the court can grant an injunction if the alleged reclamation works carried out by the defendant would destroy the subject matter of the plaintiffs' claim pending trial.

(iii) On the issue of *status quo*

Having considered the respective submissions on this issue by both the parties, I find that the plaintiffs had conceded that they were not aware of the types of works by the defendants and whether the defendants had obtained approval for such works prior to February 2013. But what they were asking the court to do was to restrain the defendants from continuing destroying the subject matter of the claim once the suit was filed.

I am of the view that to maintain the *status quo* as claimed by the defendants does not solve the problem as there was a great likelihood that the subject matter of the claim would have been destroyed by the time the suit was resolved by the court.

The more pertinent issue is not whether to maintain the *status quo* as claimed by the defendants but whether this court should restrain the defendants from carrying out further activities which would further destroy the subject matter of the claim so as to preserve the plaintiffs' customary territory in its original state as far as it could. On the whole I find that the balance of convenience does not tilt in favour of maintaining the *status quo*.

(iv) Undertaking as to damages

It is true that as a general rule an undertaking as to damages by a plaintiff ought to have been given on every interlocutory injunction.

However, the court has the discretion to waive an undertaking as to damages. See *Allen v. Jambo* [1980] 2 All ER 502 and *Lim Khoo Eong v. Trustee of Leong San Tong Khoo Kongsi (Penang) Registered & 2 Ors* [1986] 1 LNS 5; [1987] 2 MLJ 621.

I agree with the plaintiffs that the undertaking as to damages should be waived in this case based on the following reasons:

(a) The plaintiffs are the Orang Asli, the first peoples of Malaysia with very limited means and a requirement that they give an undertaking as to damages is tantamount to shutting them out of the court: *Maurice Bujang v. Peter Nansian Ngusie* [2007] 8 CLJ 431.

As regards the defendants' contention that the requirement for an undertaking as to damages must not be disposed of on the premise that the plaintiffs are people of limited means since the plaintiffs have abandoned they customary way of lives and are no longer fully dependent on their customary territory as a source of their livelihood, I find that such a contention is without merit because it was not substantiated with any concrete proof that all the plaintiffs are no longer dependent on their customary territory for their livelihood.

(b) This suit is a unique case involving public interest as it deals with the rights of aboriginal peoples of Malaysia. It is in the public interest that the aboriginal peoples' rights to their customary territory if established should be protected. A consideration of public interest is a relevant factor in granting an interlocutory injunction. The court should have been more concerned with the essential justice of a case, rather than the plaintiffs' financial ability. However, I find that the unique position of the plaintiffs as the aboriginal peoples has outweighed the plaintiffs' financial ability which warrants the court to dispense with the usual undertaking as to damages.

(v) On the allegation that the plaintiffs have failed to make a full and frank disclosure on the facts that some of the plaintiffs have received some purported compensation, I find that such an allegation is without merit as the affidavits sworn by the seventh and the ninth defendants consist of bare averments without being substantiated by any concrete evidence. A perusal of the exhs. LKH7 and CYM5 in the affidavits of the seventh defendant and the ninth defendant respectively showing 188 thumbprints without any acknowledgement of payments.

Decision

[43] All matters considered, I have come to the conclusion that the plaintiffs would suffer a greater injustice if relief is withheld.

[44] I therefore find that the balance of convenience lies in favour of the grant of an injunction.

[45] For the above reasons, I grant order in term of prayers 1 and 2 of the plaintiffs' application with cost in the cause.